89-1763

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1989

BRENDA CORNWELL,

Petitioner,

v.

GARY CRAWFORD and CITY OF RIVERSIDE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it contrary to the purposes of the Civil Rights Act of 1871, 42 U.S.C. 1983 (1982), to permit a prevailing civil rights plaintiff to be compelled to accept payment of punitive damages assessed against a police officer defendant from the municipality who employs the officer, when a state statute permits its municipality to pay such damages?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brenda Cornwell petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-6a) is reported at 896 F. 2d 398. On April 16, 1990, the

[1] Parties below who have no interest in this proceeding are: plaintiff, Fetus Cornwell; defendants, Carmen Andrade, Benjamin Reiser, Jackie Bell, and Richard Bradley.

Court of Appeals denied petitioner's request for rehearing with suggestion for rehearing *en banc*. (App. B) The district court order is at App. C.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1990. F.R. App. P. (West 1990) Rule 36. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 1 of the Ku Klux Klan Act of April 20, 1871, as amended, 42 U.S.C. 1983(1982), provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Government Code (West 1990) Section 825(b) provides, in pertinent part, as follows:

> Notwithstanding . . . any other provision of law, a public entity, other than the state . . . is authorized to pay that part of a judgment that is for punitive damages if the governing body of that public entity, acting in its sole discretion, finds all of the following . . . . [The judgment is against an employee who acted within the

course and scope of employment and in good faith, without actual malice, and in the apparent best interests of the public entity.]

STATEMENT

On April 4, 1986, petitioner, who was three months pregnant, was at her home on Cover Street, in Riverside, California. Two of the five Riverside police officer defendants were trying to gain admittance to a party at the home next door to petitioner's home for the alleged purpose of detecting evidence of underage persons consuming alcoholic beverages. These two "undercover" officers were not in uniform, got into a dispute with a partygoer, and that dispute spilled over into petitioner's front yard.

Petitioner who was watching television with her spouse and two minor children, went outside to ask the two officers and the partygoer to leave her yard and to stop making noise. The officers, who did not identify themselves, ignored petitioner's request. Petitioner then went into the house next door to request that her neighbors ask their partygoers to leave petitioner's front yard; but, by the time she exited the neighbor's home, petitioner's spouse had been arrested for attempting to convince the officers to leave petitioner's front yard, and was laying face-down on the ground in petitioner's front yard.

The other police defendants had, by this time, arrived, and as petitioner exited her neighbor's home, petitioner witnessed numerous officers near her home, and one officer in the doorway to her home. Petitioner feared for the safety of her two minor children who had been left inside her home, and ran toward her door. There, she was met by an officer who forcefully struck her in her (pregnant) stomach.

Petitioner was taken into police custody and transported to a nearby hospital where respondent Crawford forced her to submit to his taking a photograph of her abdomen from the top of her pubis to the bottom of her breasts, for the stated purpose of gathering evidence that petitioner's pregnant stomach had not been injured by the blow she received from the other officer at the door to her home.

On May 2, 1988, the jury returned its verdicts in favor of petitioner, and against the police officers and awarded damages as follows: (1) against the officer who punched petitioner in the stomach, $25,000 compensatory damages, and $75,000 punitive damages; (2) against the two officers who took petitioner into custody, each $2,000 compensatory damages, and $8,000 punitive damages; (3) against the supervising sergeant at the scene who approved the other officers' conduct, $50,229.97 compensatory damages, and $200,000 punitive damages; and, (4) against respondent who photographed petitioner, $10,000 compensatory damages, and $40,000 punitive damages.

On defendants' motion for a remittur, the district court reduced the total $327,000 punitive damages award to $45,000 by reducing the award against the officer who punched petitioner from $75,000 to $15,000; against the two arresting officers from $8,000 to $500 each; against the supervising officer from $200,000 to $25,000; and against respondent who photographed petitioner from $10,000 to $4,000.

In ordering the remittur, which petitioner accepted, the district court had the following to say about the defendants' conduct:

> In this case, there was ample evidence from which the jury could determine that the plaintiff was unnecessarily and brutally hit in the stomach while she was pregnant, and at a time when she simply was proceeding toward her own home for the purpose of protecting her children. [W]hat we are dealing with is the deprivation of important constitutional rights, and the imposition of a physically injurious and extremely humiliating set of actions . . . . The violation of civil rights is no minor matter, for it can shake one's confidence in the stability of rights in our society . . . . [T]he acts of the officers were wrong and seriously so . . . . the purpose here is to send a message to the officers and others like them.

Of the individual officers' conduct the court had this to say:

> [The punching officer's] actions and what the jury must have found to have been his untruthfulness about them [indicate] that it is most important that [he] be sent a strong message about the consequences of such activity [hitting a pregnant woman in the stomach] to preclude him from so behaving toward citizens in the future.
>
> [The two arresting officers m]ust be remind[ed] their primary obligation is to the Constitution rather than their superiors, and deter[red] . . . from further violation . . . ."
>
> [The supervising sergeant] was in charge . . . . [H]e surely could have done a great deal to prevent the ultimate injury . . . by firmly stepping in and preventing any further invasion of rights. Instead, he stood by and adopted [the punching officer's] actions, allowed and encouraged more invasions . . . and bears responsibility for [the] arrest and the ultimate photography session [in which petitioner's

> pregnant stomach and pubis were photographed against her will]. [What he permitted] strip[ped] plaintiff of her standing as a citizen and individual, and [he] must bear responsibility for that serious . . . situation. [T]he jury most likely also found [he] was untruthful on the witness stand, and that a strong message was necessary for the purpose of precluding improper activities by him in the future.
>
> [Respondent who photographed plaintiff must know h]is actions were oppressive and improper . . . . [He] even took steps to make [the photographs] cover a larger area than they otherwise would have [covered, including plaintiff's pubis and breasts]. [He must be deter[red from] further conduct of th[is] nature and . . . punish[ed] . . . for what he did.

The City of Riverside then, pursuant to California Government Code Section 825(b), made the requisite findings and decided to indemnify the officers' punitive damages. Petitioner refused to accept payment of the punitive damages from the City, and began execution of judgment against the individual officers.

Eventually, the district court stayed execution pending the outcome of the resolution on appeal of the issue presented in this Petition. While the appeal was pending, petitioner reached a settlement with all defendants, except respondent officer Crawford (the photographer).

The Court of Appeals affirmed the district court's decision that once the City tendered the punitive damages to petitioner, petitioner could not attempt to execute on those damages against the individual officers.

REASONS FOR GRANTING THE PETITION

There are at least three reasons for granting this Petition:

1. There has been a faulty construction of federal law, in which a state statute has been permitted to override the clear purposes of federal law, and this anamoly will affect numerous civil rights cases;

2. Public officials have used methods which are alien to our American system of justice, and are being permitted to escape the consequences of their unsavory conduct; and,

3. The opinion below is at odds with previous assumptions, and will operate to cause serious unwanted and unwarranted results.

It is completely contrary to the recognized purpose of the civil rights laws and the purpose for the assessment of punitive damages to permit a local governmental entity to pay punitive damages assessed against its police officers. The allowance of such indemnification in the face of an objection from a creditor of such damages who insists on enforcing the deterrent function of the civil rights laws is both wrong and contrary to settled principle and law.

> Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. Liability for . . . injurious conduct [is] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Owen v. City of Independence, 445 U.S. 622, 651-52 (1980). The district court's and Appeals Court's decisions run contrary to the deterrent purpose of Section 1983.

> The purpose of punitive damages is very clear:
>
> > to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

Devitt and Blackmar, *Federal Jury Practice and Instructions*, Section 85.11. This instruction was given to the jury in the trial of this case.

In the context of refusing to permit a civil rights plaintiff to recover punitive damages from a local government over the objection of that government, this Court made very clear the purposes that underlie punitive damages in federal civil rights actions.

> [T]he 1871 [Civil Rights] Act was designed to expose state and local officials to a new form of liability [and it] would defeat the promise of the statute to recognize any preexisting immunity without determining both the policies that it serves and its compatibility with the purposes of Section 1983. [Citations omitted.] Only after careful inquiry into considerations of both history and policy has the Court construed Section 1983 to incorporate a particular immunity defense.[2] [T]he officials' malice [for purposes of

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[2] Indeed, only those immunities that historically existed at the time the Civil Rights Act became law in 1871 have been applied by the Courts as immunities in Section 1983 actions, and it long has been the case that "[s]tate statutory immunity provisions do not apply to federal civil rights actions." *Guillory*

(Continued on following page)

> punitive damages] should not be attributed to the taxpaying citizens of the community . . . . "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent."
>
> . . .
>
> ("The [municipal] corporation can not, upon any principle known to us, be responsible for the malice of its officers towards the plaintiffs"). In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. . . . Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers. The courts thus protected the public from unjust punishment . . . . [262-64.] [W]e examine the objectives underlying punitive damages in general, and their relationship to the goals of Section 1983. Punitive damages by definition are not intended to

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(Continued from previous page)

v. County of Orange, 731 F. 2d 1379, 1382 (9th Cir. 1984). As this Court has held, to construe a federal statute to allow a state immunity "to have controlling effect would transmute a basic guarantee into an illusory promise," which the Supremacy Clause does not permit. *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980). In *Guillory*, the Ninth Circuit refused to permit California to set up California Government Code Sections (820.2 and 821.2) as immunity defenses in a civil rights action. 731 F. 2d at 1382. The holding in *Guillory* should have dictated a different result by the Ninth Circuit in the instant case, as should have this Court's *Martinez* decision.

compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct . . . . [I]t remains true that an award of punitive damages against a municipality "punishes" only taxpayers, who took no part in the commission of the tort. [266-67.]

[The] retribution should [not] be visited upon the shoulders of blameless or unknowing taxpayers. Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct . . . . Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

. . .

[D]eterrence of future abuses of power by persons acting under color of state law is an important purpose of Section 1983 . . . . [T]he deterrence rationale of Section 1983 does not justify making punitive damages available against municipalities. [268-69.] [T]here is a more effective means of deterrence [than assessing punitive damages against governmental entities]. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations . . . . The Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a governmental employer. [Citation omitted.] We see no reason to depart from that conclusion

> here, especially since the imposition of additional penalties would most likely fall upon the citizen-taxpayer.
>
> To add the burden of exposure for malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities. [270-71.]

City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 266-71 (1981).

This Court unequivocally has declared that the malice of individual government officials "should not be attributed to the taxpaying citizens of the community" and that a municipality cannot "be responsible for the malice of its officers." "Punishment properly [can be] applied only to the actual wrongdoers." "Retribution should [not] be visited upon the shoulders of blameless or unknowing taxpayers."

Yet, the State of California has attempted to accomplish precisely what the United States Supreme Court has forbidden: an attribution to the taxpaying citizens of the community of the malice of government officials. While the State has the power to regulate attribution of punitive damages in *its* courts, it has no power whatever to permit payment of punitive damages by its local governmental entities when such damages are assessed in a federal court. United States Constitution, article VI (the Supremacy Clause). Apart from the federal constitutional block to such state permissiveness, the purposes of assessment of punitive damages in civil rights actions do not permit such burden-shifting. Moreover, traditional notions of punishment and responsibility do not permit the sort of burden-shifting permitted by the State.

In January 1986, California's new punitive damages burden-shifting law took effect. California Government Code (West 1990) Section 825(b). That Section permits governmental entities in California to pay judgments for punitive damages under certain prescribed circumstances by making findings that employees acted within the course and scope of their duties and acted in good faith. (Of course, such a finding of good faith would be completely at odds with any jury verdict in a federal civil rights action against government employees whom a jury necessarily would have found not to have been in good faith by its rendering of a verdict against such employees; not to mention it being completely at odds with the necessary mixed factual/legal finding predicate for an award of punitive damages: wantonness, malice, or oppression.)

The California statute may not have any effect whatsoever in this action. Section 1988 of volume 42 of the United States Code provides that:

> The jurisdiction in civil . . . . matters conferred on the district courts, by the provisions of this Title, . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, *so far as the same is not inconsistent* with the Constitution and laws of the United States, shall be extended to and govern said courts . . . .

(Emphasis added.) Section 1988's first sentence, *supra*, puts into effect the principle of assimilation of laws, but

limits the application of assimilation to be consistent with the mandate of the Supremacy Clause, *supra*. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof[ ] . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, and any thing in the Constitution or laws of any state to the contrary notwithstanding.") The assimilative provisions of Section 1988 can have no application in instances in which state law is incompatible with, or contrary to, federal law, *Robertson v. Wegmann*, 436 U.S. 584 (1978), as here. In considering questions of inconsistency between federal law and state law for the purposes of assimilative application of state law under Section 1988, the policies underlying federal law must be considered and put into effect; and state law may *not* be applied assimilatively when such application would be inconsistent with the principles underlying federal law. *Bell v. City of Milwaukee*, 746 F. 2d 1205 (7th Cir. 1984). For example, it has been held that conflicting California state law concerning an award of attorneys' fees may *not* be applied when such California state law is inconsistent with federal law. Section 1988 preempts application of conflicting California law when it is inconsistent with federal law. *La Raza Unida v. Volpe*, 545 F. Supp. 36 (D. Cal. 1982).

The provisions of Government Code Section 825(b) are inconsistent with the federal common law of punitive damages, and therefore the provisions of that Section may not be invoked in this federal civil rights action to vouchsafe from the burden of punitive damages the malefactor police officer against whom the jury in this case

quite rightly assessed punitive damages with every expectation that the officer, and not the City of Riverside, would pay those damages.

"Title 42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is 'necessary to furnish suitable remedies' under § 1983." *Carey v. Piphus*, 435 U.S. 247, 258 n. 13 (1978). Federal courts are to turn to state law in order to fill gaps which may exist in federal law. *See Brazier v. Cherry*, 293 F. 2d 401, 409 (5th Cir. 1961). When federal law is sufficient to carry the *policies* of the civil rights statutes into effect, resort to state law is not necessary. *Ibid.* "Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988 . . . ." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). *A fortiorari*, so too are punitive damages governed by federal standards when they are awarded for deprivation of *federal* right. "[R]esort to State law . . . should not be undertaken before principles of federal law are exhausted." *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). Here, principles of federal law are not exhausted, and need not be exhausted, because the principles underlying federal law require that those against whom punitive damages are assessed, must bear the burden of those damages. Federal law allows the imposition of punitive damages even in cases in which such recovery may not be had under state law. *Smith v. Wade*, 461 U.S. 30 (1983). *A fortiorari*, in cases in which state law attempts to make nugatory an award of punitive damages, *viz.*, California Government Code Section 825(b), federal law does not permit the assimilation of those state law provisions to thwart the impact of federal law.

It has been stated that a goal of assimilation of state law under Section 1988 is the achievement of uniformity of federal law. *Wilson, supra; Owens v. Okure,* 109 S. Ct. 573 (1989). It would be wholly inconsistent with the Supreme Court's view of the application of state law through Section 1988 to permit assimilation of California's Section 825(b) because California thereby would be permitted to have a *sui generis* rule that would permit its government officials to escape the burdens of their misconduct while government officials in other jurisdictions would have to bear that burden. It thus is inconsistent with the Supreme Court's view that there be uniformity of application of the civil rights laws to permit respondent here to shelter himself under Section 825(b).

The opinion below glibly, and based on reasons set forth therein that are admittedly wholly inconsistent with federal law, but consistent with the panel's author's antipathy to civil rights plaintiffs, brushes aside precedent and the admitted "harmony" between petitioner's position and the "[Supreme] Court's analysis of punitive damages[,]" 896 F. 2d at 400, to reach the results-oriented conclusion that state law may operate to vouchsafe from the imposition of punitive damages miscreant police officers so that civil rights "plaintiff[s] would [not] have an extraordinary weapon with which to negotiate with individual defendants [in civil rights actions]." *Ibid.* The opinion is significantly flawed, for the following reasons. (Each initial quotation from the opinion is followed directly with the reasons it is flawed.)

1. "There is no doubt that the damages awardable under 42 U.S.C. § 1983 are a matter of federal law. California cannot set up a policy subversive of that law.

. . . City of Newport does not establish a federal policy prohibiting a city from paying punitive damages . . . . [T]he city is not bound by the jury's findings . . . . " 896 F. 2d 398 at 399.

These statements are misguided. First, California's enactment of Government Code Section 825(b), which permits indemnification of punitive damages by California government entities *is* "subversive" of the federal law of punitive damages. That is so because it permits those against whom punitive damages have been assessed not to pay them; the damages are *punitive – to punish,* and surely this Court would hold that a California statute that permitted a governmental entity to designate one other than one convicted of a crime to serve jail time to be "subversive" of federal law, and would strike down such a statute very quickly. It is not the policy set forth in *City of Newport,* as the panel misleadingly claims, that is the policy in issue (and therefore, that *City of Newport* does not establish a policy), rather, the policy is the very federal law noted by the panel that "the wrongdoer himself [or herself] . . . is made to suffer for his [or her] unlawful conduct . . . . " 896 F. 2d at 399. Section 825(b) is "subversive" of this policy. While the City may not be bound by the jury's findings, the defendant against whom punitive damages are awarded should be. Petitioner here does not seek to bind the City; she seeks to bind the defendant. And, the Court has the power to bind the City in this case, *see, e.g.,* 28 U.S.C. 1651(a), because the City was a party.

2. "We find no federal law prohibiting California cities from acting under the authority conferred by the

California legislature. When Congress has wanted to prohibit payment of damages on behalf of one person by another it has known how to do so with express language." 896 F. 2d at 400. This, also, misses or avoids the point. Congress has not provided for punitive damages; the common law of damages has made that provision. Thus, to hold, as the panel did, that only congressional action may prevent indemnification of punitive damages by the government misses the point that Congress does not need to do so because the common law has done so. Indeed, Congress has not provided for innumerable matters that this Court regularly decides without the intervention of Congress that the panel in this case seems to feel is necessary.

3. "[A] prohibition on indemnification would be in harmony with the [Supreme] Court's analysis of punitive damages." *Ibid.* This statement should have warranted the relief sought, without more, because the common law, and not a federal statute, should control the outcome of this case.

4. "[That] there would be occasions when civil rights plaintiffs would go unsatisfied because the individual defendants lack the assets to pay [punitive damages,]" *ibid.*, misses the point because petitioner did not ask the court to *bar* indemnification of punitive damages; but simply, as the panel later divines, to permit a plaintiff who is awarded punitive damages, *to refuse to permit indemnification*. Such a plaintiff would be the only person with standing to do so, and if, in such a case that plaintiff went "unsatisfied," that would be his or her decision. The panel's "concern" here is unsupported *obiter dictum*.

5. The panel's refusal to follow the federal law of damages it admits is controlling in this case because to do so would give a civil rights plaintiff "an extraordinary weapon with which to negotiate with individual defendants[,]" *ibid.*, should be beside the point. The law should be the law, even if it is helpful to plaintiffs in civil rights cases. This is not "an additional remedy," *ibid.*, to civil rights plaintiffs – it is the law. Additionally, by enacting Section 825(b), California has arrogated to itself the power to provide "an additional defense" to civil rights defendants.[3] If, as the panel candidly admits, it does not wish, in any way, to assist civil rights plaintiffs, fairness dictates that a new defense met by a new remedy simply evens up what, prior to the enactment of Section 825(b), was a status quo.

The Court of Appeals rendered a faulty construction of the federal law of punitive damages. A State statute has been permitted to preempt federal law, and the anamoly created by this construction will affect every civil rights case in California. As the district court made abundantly clear, the public officials in this case used methods, and behaved in a manner completely alien to our American way of life, and the panel opinion permits respondent to escape the consequences intended by both federal law and by the jury. The panel opinion is wholly at odds with, and contrary to, previous assumptions concerning the federal law of punitive damages, and will result in serious, unwanted results.

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[3] *See* note 1, *supra*.

As this Court held the day before this Petition was completed, "[a] local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation." *Missouri v. Jenkins*, 88-1150 (April 18, 1990). *A fortiorari*, a local government with authority to indemnify its police for punitive damages assessed against the police, may be ordered, and should be ordered, not to pay punitive damages for respondent because there is reason based in federal law for prohibiting indemnification permitted by state law.

In *Pavelic & LeFlor v. Marvel*, 110 S. Ct. 456, 460 (1990), this Court put pay to the flawed reasoning of the Court of Appeals in this case by stating the following, which, *in haec verba*, ought to have been the ruling of the Court of Appeals in *this* case, and ought to be a part of this Court's holding in this case.

> [I]t is not at all clear that respondents' strained interpretation would better achieve the purposes of the Rule. It would, to be sure, better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney. The purpose of the provision in question, however, is not reimbursement but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that *these* purposes are better served by a provision which makes clear that, just as the court expects the signer personally – and not his law firm – to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him

> personally – and not his law firm – its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone,* is precisely the point of Rule 11.

As is the case with Rule 11 sanctions, so too should it be the case with punitive damages that retribution should fall not on the taxpayers, but on the wrongdoer, because "[t]he message thereby conveyed [will be that the blame] is *yours alone. . . .*" To hold otherwise would make nugatory the purpose and effect of punitive damages.

The Petition for Certiorari should be granted.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FETUS CORNWELL, *Plaintiff,* and BRENDA CORNWELL, *Plaintiff-Appellant,* v. CITY OF RIVERSIDE, *Defendant,* and CARMEN ANDRADE; GARY CRAWFORD; BENJAMIN REISER; JACKIE BELL; RICHARD BRADLEY, *Defendants-Appellees.*	No. 88-6593 D.C. No. CV-86-3107-FFF OPINION

Appeal from the United States District Court
for the Central District of California
Ferdinand F. Fernandez, District Judge, Presiding

Submitted January 12, 1990*
Pasadena, California

Filed February 15, 1990

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

Before: Richard H. Chambers, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Affirming the district court's order staying the collection of damages in a civil rights case, the court held that a successful 42 U.S.C. § 1983 plaintiff may not compel punitive damages payment to be made by individual defendants rather than by the city that employed them.

After appellant Brenda Cornwell brought a successful civil rights action against five appellee City of Riverside police officers, in addition to general damages, the jury awarded $45,000 in punitive damages. Under California law, a public entity other than the state is authorized to pay punitive damages awarded against its employees if it finds that the employees were acting within the course of their employment, in good faith, in the apparent best interests of the public entity, and payment would be in the best interests of the entity. When the City of Riverside offered to pay the punitive damages assessed against the officers, Cornwell refused to accept them. The district court stayed execution of the judgment against the individual officers until after a decision by the court on the appeal from the order.

[1] Based on quotation from *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981), Cornwell argued that there is a federal policy that forbids the payment of punitive damages by a municipality. [2] However, *City of*

Newport does not establish such a federal policy when the city finds its employees to have acted without malice and when the city deems it in its own best interest to pay. That the city reaches a different result as to the good faith of the officers than does a federal jury is not decisive. The city is not bound by the jury's findings when it makes its decision to indemnify.

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiff-appellant.

John M. Porter, Roberts & Morgan, Riverside, California, for the defendants-appellees.

OPINION

NOONAN, Circuit Judge:

This appeal from an order of the district court staying the collection of damages in a civil rights case presents a new question of law: Can a plaintiff successful in an action under 42 U.S.C. § 1983 and awarded punitive damages by the jury compel their payment to be made by the individual defendants rather than by the city that employed them? We agree with the district court that there is no federal prohibition against the city paying the punitive damages.

FACTS

Brenda Cornwell brought a successful civil rights action against five police officers employed by the city of Riverside, California. In addition to general damages, the jury awarded punitive damages which, by remittitur, were reduced to a total of $45,000.

Under a California statute enacted in 1985 a public entity other than the state is authorized to pay punitive damages awarded against its employees if the public entity finds that the employees were acting within the course of their employment, in good faith and "in the apparent best interests of the public entity," and the payment would be "in the best interests of the public entity." Cal.Gov.Code § 825(b) (West Supp. 1986-1990). When the City of Riverside offered to pay the punitive damages assessed against the officers, Cornwell refused to accept them. The court then stayed execution of the judgment against the individual officers, the stay to be in effect until after a decision by this court on the appeal from the order.

ANALYSIS

[1] Cornwell has constructed an ingenious argument based largely on quotation from *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981). That case held that a city was immune from punitive damages under the Civil Rights Act. In the course of reaching this conclusion the Court pointed out that the malice of the city's employees "should not be attributed to the taxpaying citizens of the community." *Id.* at 261. It further noted that under the ordinary principles of retribution, "it is the

wrongdoer himself who is made to suffer for his unlawful conduct" and that an award of punitive damages against a municipality " 'punishes' only taxpayers, who took no part in the commission of the tort." *Id.* at 266-67. Developing these statements, Cornwell argues that there is a federal policy that forbids the payment of punitive damages by a municipality.

[2] There is no doubt that the damages awardable under 28 U.S.C. § 1983 are a matter of federal law. California cannot set up a policy subversive of that law. But *City of Newport* does not establish a federal policy prohibiting a city from paying punitive damages when the city finds its employees to have acted without malice and when the city deems it in its own best interest to pay. That the city reaches a different result as to the good faith of the officers than a federal jury is not decisive: the city is not bound by the jury's findings when it makes its decision to indemnify.

An analogous case is whether public policy should prohibit insurance coverage of punitive damages in civil rights actions brought against municipal officers. A number of courts have held that absent specific legislation such coverage does not violate public policy. 1 J. Ghiardi & J. Kircher, *Punitive Damages* § 7.12 (1985). We find no federal law prohibiting California cities from acting under the authority conferred by the California legislature. When Congress has wanted to prohibit payment of damages on behalf of one person by another it has known how to do so with express language. *See* Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(g)(3) (corporation may not pay fine of its officers penalized under the act). Congress has enacted no such provision here.

What the Supreme Court has said in *City of Newport* is not addressed to the exercise of the authority conferred by the California legislature. It is well argued on behalf of Cornwell that a prohibition on indemnification would be in harmony with the Court's analysis of punitive damages. Such a result, however, is not compelled by what the Court has said. When the city decides that it is in its best interest to pay, the taxpayers have decided through their representatives that it is to their benefit as taxpayers to help out the officers. As Judge Fernandez pointed out in the trial court, there is still a substantial sting to punitive damages awarded against the individuals.

If § 1983 were construed to prohibit a municipality from paying punitive damages, there would be occasions when civil rights plaintiffs would go unsatisfied because the individual defendants lack the assets to pay. If § 1983 were construed to mean that the successful plaintiff had the option to accept or reject punitive damages that the municipality was paying on behalf of employees, the plaintiff would have an extraordinary weapon with which to negotiate with individual defendants. We do not believe we should add an additional remedy to those already provided the civil rights plaintiff.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FETUS CORNWELL, Plaintiff, and BRENDA CORNWELL, Plaintiff-Appellant, vs. CITY OF RIVERSIDE, Defendant, and CARMEN ANDRADE; GARY CRAWFORD; BENJAMIN RISER; JACKIE BELL; RICHARD BRADLEY, Defendants-Appellees.	No. 88-6593 DC# CV-86-3107-FFF ORDER (Filed April 16, 1990)

Before: CHAMBERS, FARRIS and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris and Noonan have rejected the suggestion for rehearing en banc and Judge Chambers so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appellees' Circuit Rule 27-3 Certificate Emergency Motion of March 30, 1990 is denied as moot.

APPENDIX C

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FETUS CORNWELL and BRENDA CORNWELL, Plaintiffs, v. CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD, and BENJAMIN REISER, Defendants.	Case No. CV 86-3107 FFF (Gx) ORDER ON PLAINTIFF'S MOTION FOR ORDER THAT CITY OF RIVERSIDE PAY COMPENSATORY DAMAGES AND DEFENDANTS' MOTION FOR ORDER CONFIRMING SATISFACTION OF JUDGMENT (Filed Oct. 7, 1988)

The above entitled matter came on regularly for hearing on September 26, 1988. Stephen Yagman, Esq. of Yagman & Yagman appeared on behalf of plaintiff; and John M. Porter, Esq. of Roberts & Morgan and Richard R. Terzian, Esq. of Adams, Duque & Hazeltine appeared on behalf of defendants. The Court, having reviewed the written briefs submitted by the parties, and having considered oral argument, rules as follows:

IT IS HEREBY ORDERED that defendants CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD, and BENJAMIN REISER (or the City of Riverside or anyone else) shall pay the compensatory damages portion of the judgment in this matter on or before October 11, 1988. Interest on the compensatory damages portion of the judgment will cease to accrue upon such tender. Tender may be made by check from the City of Riverside, or anyone else, for all defendants. If the compensatory damages are not paid on or before October 11, 1988, plaintiff may seek execution of that part of the judgment only against the individual defendants. Plaintiff may not seek execution of the compensatory damages portion of the judgment from the City of Riverside.

IT IS FURTHER ORDERED that plaintiff, BRENDA CORNWELL, is directed to accept the separately-tendered payment of the punitive damages portion of the judgment on or before October 11, 1988 from defendants CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD and BENJAMIN REISER (or from the City of Riverside or anyone else). Tender of this portion of the judgment may also be made by check from the City of Riverside, or anyone else, for all defendants. If plaintiff refuses to accept the punitive damages

portion of the judgment after tender, a stay of execution shall take effect automatically, as described in the following paragraph;

IT IS FURTHER ORDERED that if plaintiff, BRENDA CORNWELL, refuses to accept the punitive damages portion of the judgment after tender, that a STAY OF EXECUTION shall take effect immediately and automatically, and plaintiff, BRENDA CORNWELL, and her counsel, are prohibited from enforcing or attempting to enforce the punitive damages portion of the judgment or from instituting any related proceedings to enforce the punitive damages portion of the judgment. This STAY OF EXECUTION precludes plaintiff and her counsel from taking any steps whatsoever to execute on the punitive damages portion of the judgment, including, by way of example, but not limited to, discovery proceedings against the individual defendants, the filing or recordation of abstracts of judgment in any jurisdiction, or other efforts to cloud title or assert a lien against the assets and property of defendants, or other efforts to collect the punitive damages portion of the judgment from the individual defendants. Said STAY OF EXECUTION shall remain in full force and effect until a date ten days after issuance of the mandate by the United States Court of Appeals for the Ninth Circuit or until further order of this Court, whichever occurs first;

IT IS FURTHER ORDERED that interest on the punitive damages portion of the judgment shall cease to accrue upon tender of payment. Should plaintiff prevail on an appeal of the question of the ability of the City of Riverside or any other person to pay the punitive damages portion of the judgment, interest will continue to

accrue until such a ruling has been entered by the United States Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that the "'First Amended' Undertaking on Appeal and Stay of Execution" filed May 24, 1988 and entered on May 26, 1988 is released and cancelled, and shall be withdrawn from the Court file and returned to the bonding company through counsel for defendants herein. No further bond or other undertaking shall be required from any defendant.

DATED: Oct. 7, 1988

/s/ Ferdinand F. Fernandez
FERDINAND F. FERNANDEZ
United States District Judge

Presented By:

ROBERTS & MORGAN
JOHN M. PORTER
and
ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN
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By /s/ Richard R. Terzian
Richard R. Terzian
Attorneys for Defendants

DATED: September 28, 1988